No. 82-363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

VENTURE TECHNOLOGY, INC.,

Petitioner,

—against—

NATIONAL FUEL GAS DISTRIBUTION CORPORATION and FLINT OIL & GAS COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT NATIONAL FUEL GAS DISTRIBUTION CORPORATION IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Court of Appeals applied an improper standard of review when it concluded that "there was not sufficient evidence from which a jury could rationally conclude that Distribution and Flint had entered into a conspiracy to keep Venture from entering the western New York gas production business?"

2. Whether the Second Circuit erred when it held that an inference of conspiracy was impermissible since Venture failed to show that Distribution and Flint had "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement?"

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BRIEF FOR RESPONDENT NATIONAL FUEL GAS DISTRIBUTION CORPORATION IN OPPOSITION

STATEMENT OF THE CASE

Respondent National Fuel Gas Distribution Corporation ("Distribution") is a public utility supplying natural gas at retail to customers in western New York, Pennsylvania and part of Ohio. In 1975, Distribution received about 80-90% of its gas supply from interstate pipelines originating in the southwestern United States. A small portion of Distribution's gas supply was received from local sources. (App. B-4.)*

* "App." refers to the Appendices to the Petition for Certiorari; "Pet." refers to the Petition for Certiorari; and "JA" refers to the Joint Appendix to the Briefs submitted to the United States Court of Appeals for the Second Circuit.

Petitioner Venture Technology, Inc. ("Venture"), a corporation organized in September 1975, sought to produce natural gas in western New York and sell it to Distribution during the Fall of 1975. At the time, Distribution had approximately 35 other local suppliers, including respondent Flint Oil & Gas Co., Inc. ("Flint"). (App. B-12.) Instead of meeting with Distribution's management to ascertain Distribution's current requirements, Venture simply acquired short-term leases and began to drill. (App. B-5-6.) When Venture representatives thereafter met with Distribution's executives, they were advised that for various business reasons Distribution did not then wish to purchase gas from the two wells Venture had drilled. Distribution expressed a willingness to deal with Venture in the future and to assist its entry into business. Nevertheless, Venture's principals abandoned their efforts to commence operations through Venture and drilled for natural gas through other corporate entities, some of which supplied Distribution. (App. B-8, 12.)

This action was commenced in May, 1976. (App. B-8.) Venture alleged in its complaint, among other things, violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. In view of Distribution's natural monopoly as a utility providing gas in its service area, much of Venture's effort at trial was devoted to its claim that Distribution's purchasing practices did not satisfy the obligations that Venture argued were imposed on a monopsonist by Section 2. The jury rejected this claim, but upheld Venture's claim under Section 1. (App. B-2-3.)

Distribution then moved for a judgment notwithstanding the verdict pursuant to Rule 50(b), Fed. R. Civ. P., or a new trial. Some nine months later, the District Judge, writing without the benefit of a trial transcript, denied the motion in a lengthy opinion. (*See* App. A.) On appeal, aided by transcript references, the Second Circuit reversed, holding that Venture's evidence was insufficient as a matter of law to permit an inference of a conspiracy.[1] (*See* App. B.)

1 Since the Second Circuit's holding on the conspiracy issue was dispositive, the Court recognized that it need not reach the "several

REASONS FOR DENYING THE WRIT

I

THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW

A. The Second Circuit Followed The Principles Enunciated By This Court And Deferred To The Role Of The Jury In Determining Questions Of Fact

Venture's petition urges first that "[t]he Second Circuit's decision is squarely at odds with the teachings of this Court in *Continental Ore*,[2] *Inwood*,[3] and *Pullman*,"[4] arguing that the Second Circuit failed to recognize the role of the jury in determining questions of fact. (Pet. at 17.) The decision, from which Venture fails to quote a single sentence in its entirety, speaks for itself.

Following the standard set forth by this Court,[5] the Second Circuit recognized that its role was to "determine whether the evidence, viewed in the light most favorable to the plaintiff, was sufficient to support the verdict rendered. . . ." (App. B-8.) It emphasized that it must defer to the jury unless "there

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[other] significant issues" raised by defendants on their appeal. (App. B-3.) If this Court were to grant Venture's Petition, and then reverse, the "affirmance of the District Court judgment" (Pet. at 17) that Venture seeks would be unwarranted. At the very least, it would be necessary to remand the case to the Court of Appeals for resolution of the other undecided issues.

2 *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690 (1962).

3 *Inwood Laboratories v. Ives Laboratories, Inc.*, ___U.S.___, 50 U.S.L.W. 4592 (U.S. June 1, 1982) (No. 80-2182).

4 *Pullman-Standard, Division of Pullman, Inc. v. Swint*, ___U.S.___, 50 U.S.L.W. 4425 (U.S. April 27, 1982) (No. 80-1190).

5 *See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962); *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943); *Gunning v. Cooley*, 281 U.S. 90, 93 (1930).

can be but one reasonable conclusion as to the proper judgment. . . . To do otherwise would be impermissibly to substitute our view of the evidence for that of the jury." (App. B-8.)[6] After applying this well-established standard to plaintiff's evidence, both individually (App. B-11-14) and "taken as a whole" (App. B-15), the Second Circuit determined that "there was not sufficient evidence from which the jury could rationally conclude that Distribution and Flint had entered into a conspiracy to keep Venture from entering the western New York gas production business." (App. B-9.)[7]

B. The Second Circuit Reviewed Only The Evidence That Was Favorable To Plaintiff Or That Was Uncontradicted And Unimpeached

Apparently believing that the grant of *certiorari* in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, ____ U.S.____, 50 U.S.L.W. 4592 (U.S. June 1, 1982) (No. 80-2182), and *Pullman-Standard, Division of Pullman, Inc. v. Swint*, ____U.S.____, 50 U.S.L.W. 4425 (U.S. April 27, 1982) (No. 80-1190), evidences this Court's general interest in the subject

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6 In numerous other recent cases, the Second Circuit has similarly recognized the great deference due a jury's determination of questions of fact. *See, e.g., Sirota v. Solitron Services, Inc.*, 673 F.2d 566, 573-574 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3005 (U.S. June 25, 1982) (No. 81-2367); *Beech Cinema, Inc. v. Twentieth Century-Fox Film Corp.*, 622 F.2d 1106, 1110 (2d Cir. 1980); *Lopez v. A/S D/S Svendborg*, 581 F.2d 319, 321 (2d Cir. 1978); *C-Suzanne Beauty Salon, Ltd. v. General Insurance Co.*, 574 F.2d 106, 112 n.10 (2d Cir. 1978).

7 Venture also suggests that the District Court's opinion is entitled to deference because the District Judge presided over the trial in this case. (Pet. at 11-12, 15.) This is incorrect; a District Court deciding a motion for judgment n.o.v. and a Court of Appeals reviewing the grant or denial of such a motion must apply the same legal standard in determining the sufficiency of the evidence. *Samuels v. Health and Hospitals Corp.*, 591 F.2d 195, 198 (2d Cir. 1979); *C-Suzanne Beauty Salon, Ltd. v. General Insurance Co.*, 574 F.2d 106, 112 n.10 (2d Cir. 1978). Only the jury's findings and conclusions are entitled to deference.

of the standards for appellate review, Venture seeks to invent such an issue in this case. Venture charges that the Second Circuit erred when it decided *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976),[8] a case not even cited in the decision below, and accuses the Second Circuit of flouting fundamental principles of appellate review since that time. Venture argues, again without quotation from any opinion, that the Second Circuit believes that "it may review all the evidence before the trial court and may overturn the jury verdict on the basis of any contradictory testimony" (Pet. at 2), and that, as a result, that Court now substitutes "its judgment for that of the trier of fact." (Pet. at 19.)

Despite Venture's attempt to create an issue for this Court's review, it is clear from the opinion below that the Second Circuit did precisely what plaintiff claims it should have done; that is, it considered only the evidence favorable to plaintiff and the uncontradicted and unimpeached evidence introduced by defendants.[9]

Plaintiff sought to prove a conspiracy "to prevent it from entering the market for the production of natural gas in western New York, particularly Chautauqua County." (Pet. at 3.) Summarizing the evidence that it offered, Venture refers to "the relations between Distribution and Flint, favored treatment of Flint, payments from Flint to one of Distribution's officers, complaints from Flint about Venture, the curious

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8 Venture cites this case without noting that *certiorari* was denied by this Court.

9 Other Second Circuit decisions following *Epoch* which considered challenges to jury verdicts for plaintiffs have similarly limited their review to the evidence that was favorable to plaintiff or uncontradicted and unimpeached. *See, e.g., Gehrhardt v. General Motors Corp.*, 581 F.2d 7, 10 n.3 (2d Cir. 1978); *National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953, 956 (2d Cir. 1978), *cert. denied*, 459 U.S. 1072 (1979); *Lopez v. A/S D/S Svendborg*, 581 F.2d 319, 321 (2d Cir. 1978); *see also Unijax v. Champion Int'l, Inc.*, 683 F.2d 678, 684 (2d Cir. 1982); *Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163, 167-68 (2d Cir. 1980).

circumstances of the Frey transactions, a selectively and retroactively imposed spacing policy, and *post hoc* rationalizations of otherwise commercially irrational business conduct." (Pet. at 21.)

The only evidence to which Venture refers that involved communications between Distribution and Flint *concerning Venture* was the deposition testimony of John Fox, who did not testify at trial, that Flint complained of Venture's plan to locate a well too close to existing Flint wells. Flint's president, Mr. Giallombardo, also expressed "grave concern" and "began to rant and rave" upon learning that Distribution was considering taking gas from two Venture wells at a time when Distribution was not honoring existing commitments to take gas from Flint wells in the same area because of insufficient pipeline capacity.[10] The Second Circuit considered only the evidence favorable to plaintiff concerning this communication[11] and properly concluded that Flint's complaint reflected only "normal business concerns which in no way point to conspiracy." (App. B-13.)

Plaintiff contends that "[t]he Second Circuit accepted Fox's and Giallombardo's explanation of their conversations concerning Venture—that they were limited to Distribution's existing obligation to purchase Flint's gas and the closeness of Venture's well," and disregarded the District Court's conclusion that the jury was not required " 'to accept [the defendants'] interest-motivated testimony as to the limits of their conversation.' " (Pet. at 13, *quoting* App. A-12.)[12] Plaintiff

10 Some 70 to 100 completed wells in that area had awaited hookup to Distribution's pipeline for as long as a year. (JA 1136-1137, 2092.)

11 The Second Circuit did not note that Mr. Giallombardo testified that he did not recall having had such a conversation. Nor did it rely on his uncontradicted testimony that he had never complained about Venture's entry into business in competition with Flint, although even under the standard urged by Venture, it could properly have done so. (JA 1423-1430, 1517.)

12 In fact, Fox was not employed by Distribution when he was deposed. Rather, he was the president of a company involved in major litigation against Distribution. (JA 811A-811B, 1012A, 2063.)

asserts that this demonstrates the utilization of an improper standard of review by the Second Circuit. Rejection of the testimony regarding the conversation, however, would leave the record devoid of the only evidence of a complaint by Flint to Distribution concerning Venture. A jury may not properly find a conspiracy based on its speculation as to what else might possibly have been said.

The remaining evidence to which Venture refers to prove the alleged conspiracy concerned either (1) dealings between Flint and Distribution wholly unrelated to Venture, or (2) actions taken by Distribution without consultation with, or the involvement of, Flint. The Second Circuit considered all of this evidence, taking account only of evidence favorable to plaintiff or other uncontradicted and unimpeached evidence, before concluding that Venture had failed to prove a conspiracy as a matter of law.

Venture stressed the "long-standing relationship" between Flint and John Fox, Distribution's assistant secretary and director of gas purchasing, arguing that Fox had "sold his soul" to Flint. (*See* App. B-11.) Plaintiff contends that this "evidence supplied a motive [for Distribution and Flint to act in concert], demonstrating 'far more than mere contacts. . . .' " (Pet. at 12, *quoting* App. A-14.) The Second Circuit recognized and fully credited all of this evidence of close relations (*see* App. B-4-5, 10-11), while also recognizing the uncontradicted and unimpeached evidence that Fox was responsible for running Distribution's program to increase local natural gas production and that, as a result, he necessarily worked closely with Flint, as he did with numerous other local producers.[13] (Because of these efforts, the number of local producers increased from about 10 in 1970, to 35 in 1974, to over 100 at the time of trial.) (App. B-12; JA 897-899, 1909, 2050-2051.)

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13 Venture also claims that Flint received "favored treatment" because Fox agreed to meet with potential Flint investors when asked to do so. (Pet. at 3, 12, 21.) There was no suggestion at trial that Venture (or anyone else) ever made a similar request and was turned down.

Plaintiff also asserts that the Court of Appeals failed to explain why Fox's assistance to Flint through Priority Acquisitions, Inc. ("Priority"), a real estate brokerage firm he created before joining Distribution in 1969 (*see* App. B-5, 11), was insufficient evidence to establish the conspiracy it sought to prove. (Pet. at 12.) However, uncontradicted and unimpeached evidence established that Priority's activities terminated in 1974 when Fox moved to Houston, almost a year before Venture was created and almost a year before the first meeting between representatives of Distribution and Venture.[14] As the Second Circuit recognized (App. B-11):

> There is simply no evidence whatsoever that the payments to Priority served as consideration for Distribution's alleged anti-Venture actions. . . . [T]his evidence merely shows close relations, and fails to demonstrate that Flint and Distribution engaged in conspiratorial conduct.

The other evidence to which Venture refers involved actions taken by Distribution alone, with no involvement of Flint. After the first meeting between representatives of Distribution and Venture on November 19, 1975,[15] Distribution decided not

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14 Venture's assertion that Fox received money from Flint at or after the time Venture was created (Pet. at 12) finds no support in the record. In 1973 Flint purchased a piece of property, paying 25% down and agreeing to pay the remainder over 5 years. Between 1976 and 1978, Priority received a commission from the seller of the property pursuant to a 1970 agreement which called for Priority to receive no compensation until the seller actually realized a profit. In 1976, the seller began to realize his profit. (App. B-5; JA 882-887, 1011, 1415-1417, 1562-1563, 2583.)

15 At that meeting, according to Mr. Waytena, Distribution agreed to purchase gas from the Boyd and Grant wells after the New York Public Service Commission had approved Distribution's proposed "price escalation" clause for gas purchase contracts. The Second Circuit accepted this testimony (App. B-6), although the five other participants at the meeting, including three other Venture officers (two of whom testified for Venture at trial), denied that any such commitment was made. (JA 221, 470-474, 1123, 1955, 2099.)

to take the gas offered by Venture from its Boyd and Grant wells. There was no evidence suggesting that this decision was other than wholly unilateral. Nor was there any evidence that Distribution was unwilling to take gas from other Venture wells; rather, the evidence was uncontradicted that Distribution had offered to take gas from those wells. (JA 2381-2382, 2409, 2465, 2471.)

One of the principal reasons for Distribution's unwillingness to take gas from the Boyd and Grant wells was their failure to conform to Distribution's well-spacing policy, which was issued on November 21. There was no evidence that Flint (or any other producer) played a role in Distribution's decision to adopt the policy, its determination of the policy's requirements (which were similar to New York State's own regulations), or the timing of the policy's implementation.[16] Indeed, Flint was vigorously opposed to any such spacing policy; after the policy was adopted, Flint moved most of its operations from New York to Ohio because it felt the policy was too restrictive. (App. B-7, 12.)[17] Also, when the well-spacing policy was

16 In its Petition, Venture quotes a statement from the District Court's opinion that "the spacing policy was rushed into place, and on a retroactive basis, within three days of Giallombardo's complaint. . . ." (Pet. at 13, *quoting* App. A-14.) As indicated above, the District Court's opinion was written without the benefit of the trial transcript. After that transcript was prepared, Distribution, in its Brief to the Second Circuit, pointed out that the record contained no evidence to support the District Court's statement, and Venture did not argue to the contrary. Venture obviously should not be relying on the District Court's mistaken understanding of the record in filings with this Court.

17 Plaintiff argues that the spacing policy may be viewed as "an act in furtherance of the conspiracy" (Pet. at 9, 16 n.8) and that the Second Circuit erroneously "wrote Distribution's spacing policy, and particularly its application to Venture, out of the case simply because Flint did not participate in the formulation of the policy and objected to its implementation." (Pet. at 9.) While a conspirator is liable for acts taken by a co-conspirator in furtherance of a conspiracy that has been proved, the only issue addressed by the Second Circuit, or Venture's petition, is whether a conspiracy was shown.

formulated, Distribution had not yet met with Venture, and thus did not know when drilling would commence on the parcels on which Venture was to drill or whether Venture would satisfy the requirements of the policy.[18]

As the Second Circuit recognized (App. B-12):

> The plaintiff's reliance on Distribution's well-spacing policy to support an inference of conspiracy must fail since there was no evidence that Flint had any role in the adoption of the policy or the timing of its implementation. Any claim of unity of purpose, common design and understanding, or meeting of the minds based on this policy cannot be credited given Flint's clear and consistent public objections to it and the uncontroverted evidence that the policy substantially harmed Flint and was a factor in its move to Ohio.

Venture also asserts that the circumstances surrounding Mr. Frey's decision to terminate his lease with Venture support an inference of the claimed conspiracy between Distribution and Flint to prevent its entry into business without ever explaining why this should be so. As the Second Circuit noted (App. B-13):

> Additional evidence [which was uncontradicted and unimpeached] demonstrates that Frey declared Venture's lease null and void since Venture had not begun its drilling operations in the time specified by the lease. This was an important provision to Frey since timely drilling would provide him with various tax advantages, and only through sheer speculation could a jury conclude that

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18 It was undisputed at trial that Distribution began work on the spacing policy in March 1975, long before it had ever even heard of Venture, and that the "problem" being addressed was close placement of wells, not Venture, despite Venture's contrary suggestion to this Court. Nor was it disputed that the policy was developed by a number of individuals, including Fox, who continued to be involved in local production matters despite his move to Houston.

> Distribution and Flint engineered Frey's termination of Venture's lease.

Finally, Venture asserts that its opposition to the "price escalation" clause may have caused Distribution's refusal to take gas from the Boyd and Grant wells, and that it was "commercially irrational business conduct" for Distribution not to purchase gas being offered without a price escalation provision.[19] (Pet. at 9.) The undisputed evidence was that Venture's "opposition" to the price escalation did not arise until December 4, 1975, the day after Distribution declined to take Venture's gas. As the Second Circuit recognized (App. B-11):

> Venture sometimes contends that Distribution sought to punish it for having the temerity to oppose the price escalation and short tract well-spacing policies. But such evidence makes it neither more nor less likely that Distribution acted unilaterally, and is, in any event, largely conjectural.

In sum, the Second Circuit reviewed the evidence, both separately and taken as a whole, "in the light most favorable to plaintiff . . . , [to determine] whether 'there can be but one reasonable conclusion as to the proper judgment. . . .'" (App. B-8.) It concluded that "the evidence points with at least as much force toward unilateral actions by Distribution as toward conspiracy, and a jury would have to engage in impermissible speculation to reach the latter conclusion." The Court therefore recognized that "[t]he evidence was . . . insufficient as a matter of law to support a finding of conspiracy." (App. B-15.)

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19 Distribution sought, and received, permission from the New York Public Service Commission to modify the price escalation clause in its gas purchase contracts in order to meet competition from gas utilities in other areas.

II

THE COURT OF APPEALS FOLLOWED ESTABLISHED STANDARDS UNDER THE SHERMAN ACT FOR DETERMINING WHETHER A CONSPIRACY HAD BEEN SHOWN.

Venture's claim that the Second Circuit requires that "the plaintiff present direct evidence of a contract or agreement" (Pet. at 21) to sustain an inference of conspiracy is another of its claims that is contradicted by the opinion itself. The Court of Appeals recognized that "[i]llegal conspiracies, of course, can rarely be proved through evidence of explicit agreement, but must generally be proved through inferences from the conduct of the alleged conspirators." (App. B-9.) It went on to explain that "if we require too great a degree of proof, we may weaken the effect of the Sherman Act and thwart its beneficial purposes." (App. B-14.) Quoting from *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946), the Second Circuit made clear that all it expected of plaintiff was to show that "the circumstances . . . [were] such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." (App. B-9.)

In an effort to create a supposed conflict between the Second Circuit and some other circuit court, Venture states that the Seventh and Eighth Circuits have held, in dealer termination cases, that "evidence of dealer complaints followed by responsive acts by a manufacturer was sufficient to support an inference of conspiracy." (Pet. at 21-22.) It suggests, citing the Second Circuit's decisions in *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3984 (U.S. May 28, 1982) (No. 81-2215), and *Schwimmer v. Sony Corp. of America*, 677 F.2d 946 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3140 (U.S. August 16, 1982) (No. 82-277), that on the facts of those cases,

a different result might have been reached in the Seventh or Eighth Circuits.

The question of a possible conflict among the circuits as to the proof required to show the existence and enforcement of a conspiracy to impose vertical restraints when a manufacturer responds to dealer complaints is undoubtedly addressed in the petitions now before this Court in *Moore* and *Schwimmer*. Venture's suggestion that the "petitions filed in *Moore* and *Schwimmer* raise many of the same issues presented here" (Pet. at 11-12 n.5), is an obvious effort to come under the umbrella of a conflict that is claimed to be presented by those other cases.

In the present case, Venture alleges that defendants sought "to prevent it from entering the market for the production of natural gas in western New York, particularly Chautauqua County." (Pet. at 3.) As indicated above, there was simply no evidence of a Flint complaint about Venture's entry. (*See* App. B-6, 13.) Nor was there any evidence of any general unwillingness of Distribution to deal with Venture. On the contrary, Distribution made repeated offers to purchase gas from Venture wells conforming to its spacing policy. Further, when Venture's principals transferred its interests to other companies, Distribution purchased from them. In short, if there is a conflict among the circuits on the issue raised in *Moore* and *Schwimmer*, it is not presented by the case at bar.

CONCLUSION

The petition for a writ of certiorari should be denied.

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